United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original as Affidavit of Mailing

76-1146

To be argued by
ETHAN LEVIN-EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1146

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UNITED STATES OF AMERICA,

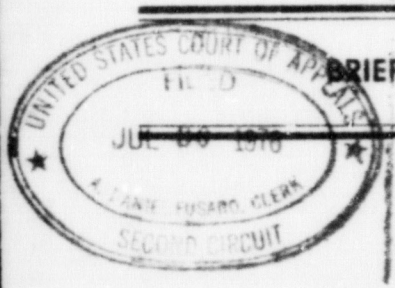
Appellee,

—against—

CHARLES FORBES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR THE APPELLEE

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FOR THE SECOND CIRCUIT

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—against—

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BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Charles Forbes appeals from a judgment of conviction entered March 19, 1976, in the United States District Court for the Eastern District of New York (Mishler, *C. J.*) following a three day jury trial. Forbes was convicted of conspiracy to steal goods which were moving as part of an interstate shipment of freight, in violation of Title 18, United States Code, Section 371, and sentenced to a three year term of imprisonment, which sentence was suspended, a two year term of probation and a $2,500 fine.[1] Execution of this sentence has been stayed pending appeal.

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[1] Appellant was originally indicted with six co-defendants. The cases against Charles Peters, Gerard Collins and Paul Flammia were severed and they entered pleas of guilty to the charge of unlawfully carrying and using firearms during the commission of a federal felony (18 U.S.C. § 924(c)(1) and (2)).

[Footnote continued on following page]

On appeal, appellant does not challenge the sufficiency of the evidence but raises essentially five issues: (1) whether the initial admission of evidence which the jury was later instructed to disregard, relating to a May 1972 hijacking not charged in the indictment, prevented appellant from receiving a fair trial; (2) whether the alleged failure of a prosecution witness to disclose that the Government had promised him protection and a change of identity requires reversal; (3) whether the District Court erred in permitting evidence of appellant's false exculpatory statements; (4) whether there was improper cross-examination of a defense witness; and (5) whether the District Court's accomplice charge was erroneous.

Statement of Facts

1. The Government's Case

A. The "Drop"

Paul Fleischer, an admitted hijacker and convicted felon (38-53; 147),[2] was the Government's main witness. According to Fleischer, in late 1971, he met a Charles Peters who propositioned him to join a hijacking crew which Peters was then organizing (53-57). Fleischer

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They received eight, eight and six year prison terms, respectively, to run consecutively with New York State prison terms which they were serving. Rocco Mastrangelo and Joseph Addoloria were convicted after trial and are now serving prison terms of seven and nine years respectively (See, *United States* v. *Mastrangelo* and *Addoloria*, Docket No. 75-1411; affirmed without opinion in open court on February 25, 1976). The case against Gerald Barry was severed and he entered a plea of guilty to a one count superseding information charging him with being an accessory after the fact to the crime of theft of goods traveling as part of an interstate shipment (18 U.S.C. § 3). He was sentenced to two years probation.

[2] All references refer to the trial transcript.

agreed and said that he knew of a "drop" which the gang could use in New Jersey (57-58).[3] He told Peters that the "drop" was a garage called "Forco", that it was located on Tonnelle Avenue in North Bergen, New Jersey and that it was appellant's place of business (58-60). Fleischer related that he had been to the drop ten or fifteen times before he told Peters about it and that he had first learned of it in 1970 when a hijack crew, with which he had been previously associated,[4] stole a truck in New Jersey and brought it there (58-59). On that occasion the gang had dealt directly with appellant. During that initial meeting, appellant had stated that Fleischer could use the "drop" for a fee of $1,500 (61-62). Thereafter, on a number of occasions during 1970, Fleischer met with appellant at the garage ("Forco's") and discussed plans for bringing additional trucks to him. Appellant was to receive $1,500 per truck. At some of these meetings Gerald Barry, a relative of appellant, was also present (62-70). Moreover, during each of these visits, appellant would complain that Fleischer (and his crew) had failed, as promised, to bring trucks (77-78). Fleischer in describing appellant's business to Peters, said that it was "the best drop [he had] ever seen in [his] life" (70).

After describing appellant's "drop" to Peters, Fleischer and Peters then visited "Forco's" and met with appellant (79-80). They reached an agreement that any trucks they stole could be brought to appellant's place of busi-

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[3] Fleischer explained that a "drop" was a place where stolen trucks were brought in order to transfer the stolen merchandise to non-suspicious vehicles (57-58).

[4] Fleischer testified that he had been involved with a number of different hijacking crews. The theft which took him to appellant's, however, was committed by the gang run by a Robert Parthesius (47-53; 58).

ness and that he would be paid a fee of $2,000 for each one unloaded at the garage (80-81). No more specific plans were made, and appellant was told that he would be notified when his services were required (82).

Following the introduction of Peters to appellant, Peters introduced Fleischer to the other six members of the gang, which included Flammia's brother-in-law, Gerald "Rebel" Collins, Rocco "Rocky" Mastrangelo and Joseph "Joe Baldy" Addoloria (83-84). Peters told them that he had located an ideal "drop" in New Jersey (84-85). Thereafter, in early 1972, the group of six hijackers met, almost on a daily basis, at Flammia's mother's home, located in Queens, New York, to discuss hijackings (85-87). On at least one occasion Peters took Addoloria and the others to see the drop (87-89). During the period that Peters' group was planning the hijackings, Peters and Fleischer regularly visited appellant to discuss the promised impending deliveries of stolen trucks (89-90). Fleischer testified that on each of these visits "Forco's" was an active garage and there were many trucks on the premises (90).

During the period between January, and May, 1972, Fleischer's and Peters' crew was responsible for numerous thefts, although none of the trucks which were stolen were delivered to appellant (91-92). In mid-February, however, the time came when it was decided that appellant's drop would be used. One of the hijackers, Mastrangelo, called appellant from Flammia's mother's house and was told by appellant that "the drop was open" (92-93). That evening a truck-load of tools, belonging to the Royal Merchandise Company, was stolen, but, again, appellant's drop was not used (93).

B. The Arlene Knitwear Company Theft

Shortly thereafter, the hijackers' attention focused on a truck which belonged to the Arlene Knitwear Company. Fleischer had observed the truck being loaded each day with garments and reported the potential prize to his colleagues (93-94). During the next few weeks the theft was planned and it was decided that the truck, after it had been stolen, would be taken to appellant's garage (94-95). Mastrangelo again called appellant from the Flammia house to make the necessary arrangements (96-97).

On March 3 1972, according to a plan agreed upon by the hijackers and appellant, Mastrangelo and Flammia went to "Forco's" to await the arrival of the stolen truck (101). The others, including Fleischer, arranged to commit the theft in Brooklyn. At approximately 8:30 A.M., while it was raining heavily, the truck was cut off and the driver was kidnapped (103-107). Fleischer then started to drive the stolen truck to appellant's garage with Addoloria following (107).

As they drove towards New Jersey, it became apparent that the rain, which had caused extremely heavy traffic, made it inadvisable to follow through with the original plan, and they decided to take the stolen truck to an alternate "drop"—a warehouse belonging to the Airfreight Haulage Company on West 19th Street in Manhattan (108-109). Enroute, Addoloria telephoned Mastrangelo and Flammia at appellant's place of business, to tell them of the change of plans (109-110). Mastrangelo and Flammia agreed to meet Fleischer and Addoloria at the West 19th Street "drop". When the truck arrived at the West 19th Street warehouse, Fleischer, Addoloria and Sam Weiner (a warehouse employee known to Fleischer, who had at one time been his co-

worker) broke into the truck and inadvertently set off the alarm (111-112). In order to silence the alarm all the wires were torn from the truck. This not only stopped the noise, however, but disabled the truck as well (112, 114-115). As the truck, which contained sweaters, was being unloaded, Mastrangelo, Flammia, Peters and Collins arrived at the warehouse. Because the truck was inoperable, it was decided that appellant's truck repair shop should be called (114-115). Mastrangelo then called appellant from the warehouse and arranged for one of appellant's large tow trucks to be dispatched to West 19th Street (115-116). Approximately 45 minutes later, Gerald Barry arrived in a "Forco" truck, and the stolen truck was towed to the vicinity of the old Federal Detention Headquarters on West Street, in Manhattan, and abandoned. Fleischer and the others returned to Flammia's mother's house and Barry returned, with the tow truck, to "Forco's" (117-118, 121). Thereafter, according to Fleischer, the stolen sweaters were disposed of through various buyers located in Brooklyn (122-139).[5]

C. The Splendorform Brassiere Theft

Fleischer then described a May 1972 theft of a shipment of Spendorform Brassieres (140-146). When the

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[5] Two indictments related to the one in which appellant was named were filed. Indictment 75 Cr. 278 named Gerald Allicino and Seymour Rosenwasser as being two of the receivers of the stolen property, in violation of 18 U.S.C. §§ 659 and 2. Allicino and Rosenwasser were found guilty of these charges and a conspiracy count; and judgment was entered on May 20, 1976. Rosenwasser's appeal is now pending before this Court (Docket No. 76-1260), indictment 75 Cr. 280 named Solomon Broverman, Wallace Cascio, Lawrence Cesare and Eugene Santore as additional receivers of the stolen property and conspirators. Cascio was acquitted. Broverman and Santore were convicted after a jury trial, and on June 7, 1976 Broverman's conviction was affirmed by this Court without opinion (Docket No. 76-1037). Santore did not appeal, and Cesare pleaded guilty.

witness started to describe how the hijacking plan included appellant's place of business as the intended "drop", the testimony was disallowed as outside the scope of the charged conspiracy (141-144). In an offer of proof, the Government represented that the testimony would be properly connected to appellant through the anticipated testimony of Special Agent William Klotz, Federal Bureau of Investigation, who was expected to testify that the stolen container was found a short distance from appellant's business (144). Later in the trial, Howard Lowett, an officer of the brassiere company, described the container which had been stolen by Mr. Fleischer and the others and later recovered by Agent Klotz (281-286). Defense counsel moved to strike the testimony and for a mistrial. The Government's offer of proof was that a proper connection had been, or would shortly be, made in that it would be shown that the stolen brassiere container was recovered only five miles from appellant's business (287-289). The Court struck Lowett's testimony, ruling that a sufficient connection had not been made (291).[6]

The jury was then returned to the Courtroom and were instructed that: "[t]he testimony given by Mr. Lowett on the hijacking sometime in May . . . of the brassieres shipped from Puerto Rico is irrelevant to this case and I am striking it from the record, and asking you to disregard it. It has nothing to do with this case" (293).

D. Corroboration of Fleischer

Fleischer's testimony was fully corroborated: Luther Washington, the driver of the hijacked Arlene Knitwear truck, testified and confirmed that the theft had occurred

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[6] Judge Mishler specifically found that no prejudice had occurred and denied the motion for a mistrial (291).

exactly as Fleischer had described in his testimony (206-212).

Special Agent Richard Redman, Federal Bureau of Investigation, described the stolen truck, which he had recovered in front of the Federal Detention Headquarters, with all its wiring torn out (223-231). Agent Redman further testified that he had seized seven boxes of the stolen sweaters from Solomon Broverman's residence where Fleischer had said they could be found (232-237). Larry Stein, the president of Arlene Knitwear, identified these sweaters as having been part of the stolen shipment (252-261).

Cornelius O'Donnel, an investigator with the New York Telephone Company, identified telephone records which established that at 11:26 A.M., on March 3, 1972, the telephone at Airfreight Haulage was used to call telephone number (201) 896-8662 (264-265). This number was established, by an employee of the New Jersey Bell Telephone Company, as being listed to "C. H. Forbes". At about 11:55 A.M., on that same day, a call was placed from the "C. H. Forbes" number to the telephone at Airfreight Haulage (268-269).

Bruce Malcolm, of the Ryder Truck Rental Company, testified that, according to Ryder's business records, a truck had been rented on March 6, 1972, from the Richmond Hill franchise, on Atlantic Avenue in Queens, to "Harold Marder" (270-271). (This was as Fleischer had described [124-126]). Harold Marder thereafter testified that he had lost his driver's license and that he had never rented a truck from the Ryder Truck Rental Company (273-274).

Maeola Hunter, of the Prudential Savings Bank, located at 961 Broadway, Brooklyn, New York, testified

that on March 7, 1972, Solomon Broverman withdrew $7,700 in small bills from his savings accounts (277-280). (Again this confirmed testimony by Fleischer that Broverman paid the hijackers on March 7, 1972 for his share of the load [133-138]).

Mr. Lowett testified, as described, *supra*. His testimony was stricken and the Government rested (293).

E. Fleischer's Agreement With The Government

Fleischer concluded his testimony by stating that he was then serving a three-year prison sentence imposed following his guilty plea to one count of a three count indictment charging him with theft from interstate shipment, in violation of 18 U.S.C. § 659, which plea had exposed him to a possible thirty years imprisonment. He testified that the remaining two counts had been dismissed, on the Government's motion, pursuant to a written agreement he had made with the Government which required his cooperation[7] (148-149). Fleischer conceded that he did not expect to be prosecuted for the other numerous crimes which he had admitted during his testimony. He stated, however, that no promises had been made with respect to a sentence reduction, although the subject had been discussed (150). In addition, he testified that the Government had written two letters, on his behalf, to the United States Parole Board (151).

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[7] Defense objection to the introduction into evidence of Government Exhibit 3 for identification, the written agreement between Fleischer and the Government, was sustained (153). Government Exhibits 3 and 4 for identification (the letter to the United States Board of Parole dated October 28, 1975, informing them of Fleischer's cooperation) were turned over to defense counsel before the trial. They had been marked as Exhibits 3500-32 and 3500-33, respectively, and are reproduced in the Government's Appendix at pages A-10 and A-13.

Finally, Fleischer testified that, during the course of his cooperation, he had received money from the F.B.I. and that his cooperation began in June 1972 when he turned himself in to the Government (155-156). At this point the prosecutor attempted to elicit the circumstances under which Fleischer began to cooperate. The Court, however, *sua sponte*, prevented Fleischer from answering and the following colloquy, outside the presence of the jury, ensued:

> The Court: What is this all about?
>
> Mr. Levin-Epstein [Assistant U.S. Attorney]: This has nothing to do with Mr. Forbes, your Honor. This is merely background material which is part of the 3500 material turned over as the part of the record of the previous two trials. If allowed to testify to the next few questions you will see the primary motivation behind him coming forward to the FBI was to seek assistance from the FBI, in light of Charles Peters and Larry Cesare threatening his life.
>
> The Court: Is there any objection to that?
>
> Dr. De Fazio [Defense Counsel]: Well, other than the fact that it is totally irrelevant, I would have no objection to it.
>
> The Court: If you have no objection to it, I will allow it.
>
> Mr. Levin-Epstein: Thank you.
>
> The Court: Seat the jury.

As the jury began to file back into the courtroom, defense counsel apparently had second thoughts and did object to this testimony, stating that he thought it was a "dangerous" line of inquiry. The Court sustained defense counsel's objection on the stated grounds of irrelevancy (157-159).

2. The Defense Case

Appellant testified in his own behalf that he had been in business since 1968, at the Tonnelle Avenue address, and that he operated a heavy maintenance and truck repair shop (299). He admitted meeting Peters in early 1972 at his garage, and that thereafter Peters came in "a couple of times" with Paul Fleischer (300-301). Appellant claimed that the only conversation he had with either of them related to truck repairs, rentals and other general topics (301-303). He confirmed that Gerald Barry had been employed by him in 1972, as a truck driver, but denied any knowledge of a "tow job" by Barry on March 3, 1972 (306). Appellant denied ever meeting Fleischer before 1972 and denied having any knowledge of hijackings by Fleischer or anyone else (322-323).

On cross-examination, he acknowledged that his business records showed that his telephone number was (201) 896-8662, and he conceded that on March 3, 1972 his garage had been called from the number at Airfreight Haulage and that this call had, apparently, been returned (343-346).

Appellant was then asked whether he recalled being interviewed by Special Agent Redman on March 14, 1975 (349). At this point the jury was excused and the Court heard an offer of proof by the Government that this question was to lay the foundation for proof of a false exculpatory statement, in that on March 14, 1975 appellant indicated to Agent Redman that he did not recognize a "black and white" photograph of Fleischer, but that only four days later, in the office of the Assistant U.S. Attorney, he suddenly did recognize it. Defense counsel objected on grounds that the question "served no purpose". The Court ruled, however, that the question was proper in order to elicit proof of a false exculpatory statement (350-352).

The jury returned and appellant admitted that on March 14, 1975 he had identified a photograph of Charles Peters which had been shown to him by Agent Redman, but that he told Redman that he did not recognize the one of Fleischer (353-355). The photograph of Fleischer was admitted into evidence without objection (356). Appellant was then shown the photograph of Fleischer and asked if he had identified it and signed it on March 18, 1975. He admitted that he had (357). On redirect, appellant explained that when he was shown this photograph on March 14, 1975 he did not realize that Fleischer's hair was red. However, on March 18, 1975, in the prosecutor's office, he explained, he had stated "If this fellow's hair is red, then this is the fellow, Red."[8] (375).

The defense then called Detective Vincent P. DeCarlo, who had been on the North Bergen New Jersey police force for twenty-three years (377). Detective DeCarlo testified as to appellant's good character and stated that over the years appellant's shop had been used for investigative and other police-related matters (378-384). During the cross-examination of this witness the prosecutor was reprimanded by the Court for going beyond the proper bounds of questioning.[9] Following the reprimand, the

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[8] There was testimony to the effect that Fleischer's nickname was "Red", which was, obviously, a reference to his distinctive hair color (376).

[9] The pertinent cross-examination was as follows:

[Mr. Levin-Epstein]: During this time [referring to when the witness was at Forco's on police business] you had coffee?

[Witness]: If we wanted coffee, we had it, sir.

Q: Detective DeCarlo, how many years are you on the job?

A: 25.

Q: Did you ever hear the phrase, "on the arm"?

A: Yes, sir.

[Footnote continued on following page]

prosecutor conceded that his questions and their import had overstepped the bounds of propriety and he formally apologized to the witness in the presence of the jury (386-394).[10] The Court then highlighted and gave its imprimatur to the apology by saying:

> "I am glad you made that statement. I think it is appropriate" (394).

Joseph LuedeGrof, a foreman with the North Bergen New Jersey Department of Public Works, testified that on March, 3, 1972 he and appellant were behind appellant's garage working on a truck. According to LuedeGrof, they were away from the telephone (407). However, LuedeGrof could not recall whether he was with

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Q: You know what it means; don't you?
A: Yes, sir.
Q: What does it mean?
A: Something for nothing, sir.
Q: It means you get something for nothing; doesn't it Detective DeCarlo?
A: Yes.
Q: Did you ever have any coffee——
The Court: Strike it out. Disregard that. Highly improper (386-387).

[10] The pertinent colloquey, outside of the presence of the jury, was as follows:

[Mr. Levin-Epstein] I don't mean to be surly with the Court.
The Witness: I apologize.
Mr. Levin-Epstein: So do I, Mr. Witness.
The Court: Bring in the jury (whereupon the jury entered the courtroom.)
The Court: Please proceed.
Mr. Levin-Epstein: If the Court pleases, I apologize to the witness for any implication that he accepted any sort of bribe from Mr. Forbes.
The Court: I am glad you made that statement. I think it is appropriate.
Mr. Levin-Epstein: Let me apologize to the jury if that impression was given by me. It was not intended in that manner (394).

appellant at the time of the two phone calls between "Forco" and Airfreight Haulage Company. (411-412). This witness also testified to appellant's good reputation for truthfulness (402-403).

Appellant called another character witness, William Schwartz, who testified as to appellant's reputation for honesty and hard work. In addition, appellant's son testified concerning the custom and practice of "Forco" regarding the answering of the telephone (425-427).

ARGUMENT

POINT I

The testimony of Howard Lowett did not deprive appellant of a fair trial.

Appellant argues that the Government's attempt to offer evidence of subsequent criminal activity by him through the testimony of Howard Lowett requires reversal of his conviction because it prejudiced the jury against him and deprived him of a fair trial. The contention is without merit.

It is now almost too well-established to require citation, that "[o]ther crimes evidence is admissible on the government's case in chief unless introduced solely to show the defendant's criminal character, provided that its probative worth outweighs its potential prejudice". *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975); See also Federal Rule of Evidence 404(b). In the instant case, the Government offered evidence of appellant's subsequent involvement in a similar conspiracy, not to prove his criminal character, but to prove his intent to enter into the conspiracy charged, his knowledge of what he was doing, and the organization and structure,

as well as the background and development, of the conspiracy. See, *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir. 1973). As uniformly permitted by the cases in this Circuit, and approved by the commentators *Miller*, *supra*, such evidence is, in the discretion of the trial judge (*United States* v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975)), admissible for these purposes.

In an attempt to lay the proper foundation for this evidence, and also to reveal Fleischer's criminal background, the prosecutor elicited from Fleischer that, in addition to his other crimes, he had participated in the theft of a truckload of brassieres in May, 1972 (145-146). When the witness started to describe how the hijacking plan included appellant's place of business as the intended "drop", the testimony was disallowed as outside the scope of the charged conspiracy (141-144). In an offer of proof, the Government represented that the testimony would be properly connected to appellant through the anticipated testimony of Special Agent William Klotz, Federal Bureau of Investigation (144). Later in the trial, Howard Lowett, an officer of the brassiere company, described the container stolen by Fleischer and the others and recovered by Agent Klotz (281-286). Defense counsel moved to strike the testimony and for a mistrial. Again, the Government made an offer of proof with respect to the testimony. The offer was that a proper connection had been, or would shortly be, made in that it would be shown that the stolen brassiere container was recovered only five miles from appellant's business (287-289). The Court struck Lowett's testimony, ruling, outside the presence of the jury, that a sufficient connection had not been made between the evidence and appellant (291).[11]

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[11] Judge Mishler specifically found that no prejudice had occurred and denied the motion for a mistrial, noting that defense counsel had voiced no objection to Lowett's testimony while it was being given (291-292).

The jury was then returned to the courtroom and was instructed that: "[t]he testimony given by Mr. Lowett on the hijacking sometime in May . . . of the brassieres shipped from Puerto Rico is irrelevant to this case and I am striking it from the record, and asking you to disregard it. It has nothing to do with this case" (292).[12]

Appellant makes nothing more than a bald conclusory statement that he was "prejudiced" in some unspecified way by Lowett's testimony. He makes this allegation notwithstanding the fact that no evidence was elicited as to who committed the theft (with the exception of Fleischer) or where the container was ultimately found. We fail to see how this testimony, which made no reference to appellant, affected him at all. Moreover, it is noteworthy that throughout the trial (293-296) and during summation (445, 452-454), Fleischer was characterized by appellant as an incorrigible thief. Fleischer's admission of his own participation in the brassiere hijacking therefore provided the defense with one more criminal act with which to impeach Fleischer. Indeed, it is entirely reasonable to conclude that the jury simply considered Lowett's testimony additional corroboration of Fleischer's statements concerning his own criminal activity.

Clearly, in view of Judge Mishler's cautionary instruction, the limited amount of testimony actually heard by the jury concerning the brassiere hijacking and the fact that Fleischer's admission provided the defense with additional impeaching material, Cf. *United States* v. *Malizia*,

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[12] It must be presumed that a judge's instructions to a jury are followed, especially when there is no showing of any evidence, whatsoever, to the contrary. *United States* v. *Miller*, *supra*, at 1320.

503 F.2d 578 (2d Cir. 1974), *cert. denied*, 420 U.S. 912, it can hardly be argued that Lowett's testimony constituted anything more than harmless error, if indeed it was even that.[13]

Also without merit is the claim of appellant that he was prejudiced by what he terms the Government's "constant attempt" to interject evidence of the Splendorform Brassiere theft (Point I, Appellant's Brief). As noted above, the testimony of the witness Lowett was cut off before there was any mention of appellant, and a cautionary instruction was given by Judge Mishler. Apart from a brief statement in the prosecutor's opening remarks (22), the only other reference in the trial to the May 1972 theft came during the testimony of Fleischer (Statement of Facts, *supra* at 6-7). However, Judge Mishler refused to allow the Government to elicit from Fleischer anything but the briefest testimony showing appellant's connection with the Splendorform theft, and he cautioned the jury to disregard what little was said by Fleischer concerning appellant's involvement in the crime (140-144).

POINT II

Appellant has made no showing whatsoever that as of the time of his testimony in this case any promises had been made to Fleischer regarding a new identity and relocation.

Appellant makes the unsupported assertion that, at the time Fleischer testified in his trial, he did so knowing that the Government had promised him a new identity and relocation in return for his testimony. Based on

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[13] *Compare, United States* v. *Plante*, 472 F.2d 829 (1st Cir.), *cert. denied*, 411 U.S. 950 (1973), where a Government witness' reference to appellant's criminal record was not found to be grounds for reversal.

this assertion, appellant contends that reversal is required because Fleischer's failure to disclose this "promise" was "prejudicial" and "prevented him from getting a fair trial". This claim is meritless, because it is totally unsupported by the facts.

As of January 29, 1976 (the date of Fleischer's testimony) no such promises had been made,[14] and therefore could not have been a factor bearing on Fleischer's motive to testify. See, *Gordon* v. *United States*, 344 U.S. 414, 422 (1953); *United States* v. *Campbell*, 426 F.2d 547, 549 (2d Cir. 1970).[15]

POINT III

The cross-examination of defense character witness DeCarlo did not deprive appellant of a fair trial.

Appellant argues that he was deprived of a fair trial because the prosecutor improperly cross-examined character witness Vincent P. DeCarlo, a detective on the North Bergen, New Jersey, Police Force. The Government agrees that the portion of the prosecutor's questioning of Detective DeCarlo which implied improper conduct on the witness' part (Statement of Facts, *supra*, at 12-

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[14] Inasmuch as appellant has seen fit to assert matters not contained in the record, the Government feels compelled to respond. To this end, the Court is respectfully referred to the Affidavit of Assistant U.S. Attorney Ethan Levin-Epstein, filed with the Court and reproduced in the Government's Appendix at G.A. A-20.

[15] It is not a little puzzling to the Government that counsel for appellant raises this issue on appeal when it was apparently clear to him at trial that any reference to the threats made against the witness and the Government's promise to protect

[Footnote continued on following page]

13) was unjustified and improper. We respectfully submit, however, that this incident, an unfortunate lapse in the heat of the moment in an arduously contested trial, was hardly of such a serious nature as to warrant reversal of appellant's conviction.

At the outset, it is to be remembered that the portion of the cross-examination which was improper consumed a mere 15 lines of transcript in a trial that lasted over five days. Moreover, the improper questioning was followed by an emphatic curative instruction in which Judge Mishler instructed the jury that it was to disregard the questioning. And shortly thereafter, the prosecutor himself apologized to Detective DeCarlo in the presence of the jury:

> "Mr. Levin-Epstein: If the Court pleases, I apologize to the witness for any implication that he accepted any sort of a bribe from Mr. Forbes.
>
> The Court: I am glad you made that statement. I think it is appropriate.
>
> Mr. Levin-Epstein: Let me apologize to the jury if that impression was given by me. It was not intended in that manner." (394).

Furthermore, and most importantly, it is to be remembered that Detective DeCarlo was simply a character witness. He gave no testimony concerning the facts of the case, and it was only in the most peripheral and indirect way that his testimony contributed to appellant's defense. The prosecutor's cross-examination of this sin-

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him were "dangerous" (157-159). See Statement of Facts *supra* at 10.

One can only assume that, had such a promise actually been made, and the Government tried to bring it before the jury, appellant would have voiced strong objection, arguing that it was prejudicial to him.

gle witness, albeit improper in one respect, hardly requires reversal of appellant's conviction. Indeed, this Court has refused to reverse a conviction after a trial in which the prosecutor asked a Government witness a question which insinuated that the defendant had an arrest record, clearly a much more serious impropriety than occurred here. *United States* v. *Rivera*, 496 F.2d 952 (2d Cir. 1974).

POINT IV

Cross-examination of appellant with respect to his false exculpatory statement was entirely proper.

As described above in the statement of facts at pages 11 and 12, *supra*, appellant was cross-examined at trial concerning his false exculpatory statement in March of 1975 that he did not recognize a photograph of Paul Fleischer. On appeal, appellant contends that this cross-examination was improper.

The claim is frivolous. To begin with, it ignores the long-established rule in this Circuit which allows the admission of a defendant's false exculpatory statements on the Government's *direct case* as circumstantial evidence of the defendant's consciousness of guilt. *United States* v. *Smolin*, 182 F.2d 782, 785-786 (2d Cir. 1950); *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States* v. *Montalvo*, 271 F.2d 922, 927 (2d Cir. 1959), 2 Wigmore on Evidence, § 278 at 120 (3d Ed. 1940). Moreover, in this case the evidence of the false exculpatory statement was not offered as part of the case in chief. In fact, no mention of the false statement was made at all until appellant himself took the witness stand. Only then, on cross-examination, was appellant challenged on his

claimed inability to identify Fleischer in the photograph shown to him on March 14, 1975 (350-360).[16]

Moreover, it is important to note that this cross-examination was the only point in the trial at which the Government brought the false exculpatory statement to the attention of the jury. Contrary to the claim of appellant, the record clearly shows that the prosecutor made no mention of the statement in his closing argument (454-478), although it certainly would have been entirely proper for him to have done so. Indeed, it was defense counsel, in his summation, who argued the issue of the statements to the jury. Finally, the jury was explicitly, and correctly, instructed as to what significance, if any, it might attach to the statements (492-494). If any question existed in the minds of the jurors as to the purpose or value of this evidence it was fairly resolved by Judge Mishler's charge. Appellant's claim of error is clearly without merit.

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[16] Ample opportunity was afforded appellant, on redirect examination (374-375), to explain his sudden recognition of Fleischer on March 18, 1975 in the office of the Assistant United States Attorney.

Appellant's explanation of his failure to identify Fleischer initially consisted of a reliance on the fact that the photograph shown to him on March 14, 1975 was a "black and white" print. Notwithstanding the conceded fact that he met with the red-haired Fleischer almost monthly, it was only when he was told that the hair in the photograph was red, that Fleischer's face "became familiar" to him (357-358; 374-375).

POINT V

Judge Mishler's charge on accomplice testimony was proper.

Appellant's final contention on appeal is that Judge Mishler failed to instruct the jury on the weight to be given the testimony of accomplice-witness Fleischer. Specifically, the claim appears to be that the jury should have been told that Fleischer's testimony had to be corroborated. The argument is entirely without merit. The jury was properly instructed on Fleischer's testimony.

It is a settled rule, and defense counsel conceded at trial (285-286), that the Government need not corroborate a co-conspirator's testimony in order to prove its case. *United States* v. *Corallo*, 413 F.2d 1306 (2d Cir. 1969). Thus, although the Government did present considerable evidence corroborate Fleischer (Statement of Facts, *supra*, at 7-9), such testimony was not, as a matter of law, required. Moreover, Judge Mishler correctly instructed the jury as to the way in which it was to consider Fleischer's testimony (*United States* v. *Corallo*, *supra*):

> "Paul Fleischer testified that he participated in the crime charged. You have the right to suspect the testimony of the participant in the crime charged if you find that he has a personal stake in the outcome of the trial or if you find that he believes that the rewards promised depends on the outcome of the trial. Paul Fleischer is not incompetent to testify because of his participation in the crime charged. On the contrary, the testimony of such a participant alone if believed by the jury to be true beyond a reasonable doubt, may be

> of sufficient weight to sustain . erdict of guilty, even though not corroborated or supported by other evidence in the case. The jury should keep in mind that the testimony of an accomplice is always to be received with caution and weighed with great care. You should never convict a defendant of (sic) an unsupported testimony of an alleged accomplice, unless you believe such testimony to be true beyond a reasonable doubt. Paul Fleischer testified that he was convicted of a felony. As a matter of fact, convicted of participation in the crime charged here. The testimony of a witness may be disconsidered or impeached by showing that the witness has been convicted by a felony, that is a crime punishable in prison. It does not render a way (sic) you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight of any given testimony as impeachable." (494-495).

Significantly, defense counsel failed to voice any objection to the Court's charge. In fact, when appellant's attorney was asked if he had any comments on Judge Mishler's instructions, he replied "Satisfactory Your Honor." (506). Since no exception was taken to Judge Mishler's instructions below, the charge can only constitute grounds for reversal if it is found to have been so improper, in the context of the case, as "to be plain error affecting substantial rights of the appellant." *United States* v. *Rosenthal*, 470 F.2d 837, 843-844 (2d Cir.), *cert. denied*, 412 U.S. 909 (1972). Judge Mishler's accomplice charge was hardly plain error. On the contrary, as demonstrated above, it was entirely correct. *United States* v. *Corallo*, *supra*.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: July 28, 1976

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Mary Smith in the preparation of this brief. Ms. Smith is a third year law student at the Hofstra Law School.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 30th day of July, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Charles DeFazio, III, Esq.
922 Washington Street
Hoboken, N. J. 07030

Sworn to before me this
30th day of July, 1976

Martha Schaff

MARTHA SCHAFF
Notary Public, State of New York
No. 24-3400340
Qualified in [illegible] County
Commission Expires March 30, 1977

Lydia Fernandez

LYDIA FERNANDEZ